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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 10/781,710
Filing Date: February 20, 2004
Appellant(s): SAKUTA, KOJI

Brion P. Heaney
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed May 20, 2008 appealing from the Office action mailed September 20, 2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

EP 0501791	Sakuta	9-1992
USP 4,937,069	Shin	6-1990
USP 6,060,546	Powell et al.	5-2000
USP 6,262,170	Kilgour et al.	7-2001

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1) Claims 8-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sakuta (EP 0 501 791) in view of Shin (US 4,937,069).

Sakuta discloses silicone polymers obtained by the addition of at least one organohydrogenpolysiloxane and a polyoxyalkylene and/or organopolysiloxane. The polymer is capable of being swollen with silicone oil to give a uniform, pasty composition without use of any surface active agent and may be used in cosmetics and medicines (see Abstract). The silicone oils include dimethylpolysiloxane and decamethylcyclopentasiloxane, encompassing claim 13. The viscosity of the oil is no

higher than 100 centistokes at 25°C, encompassing claims 19-20 (page 5, lines 10-12). The disclosed compositions include polyhydric alcohols such as 1,3 butyl glycol (see Examples). In regards to the non-aqueous limitation, the claims recite a cosmetic material. They do not stipulate the compositions cannot be incorporated into an aqueous composition. The reference does not specifically disclose that the disclosed compositions are used only in compositions comprising water, therefore it may be used in non aqueous compositions. In regards to the amounts by parts, it is not clear because there is no final volume, weight or parts. The reference differs from the instant claims insofar as it does not disclose an aluminum compound in combination with the silicone composition paste.

Shin et al. discloses anhydrous compositions comprising silicone oils. Disclosed are problems associated with hydrous compositions. The problem with hydrous compositions is the problem of syneresis or bleeding from the thixotropic gel system in which the liquid contained in the semi-solid stick separates out resulting in an unappealing product and fabric staining. Other problems encountered with semi-solid sticks are that they are sometimes too hard, this interferes with the ability to dispense these products from a roll-on or extruding package, and undesirable wet, cold and sticky sensations experienced when aqueous based products are applied to the skin (col. 1, lines 21-38). Silicone oils include dimethyl polysiloxane and cyclomethicone. The disclosed compositions comprise antiperspirant actives such as aluminum compounds including aluminum zirconium tetrachlorohydrate ($Al_4\ Zr(OH)_{12}Cl_4$); aluminum zirconium trichlorohydrate and aluminum chlorohydroxide (col. 2, line 53 to col. 3). The

compositions may also comprise stearyl alcohol or Alcohol SD-40, encompassing claims 16-18 and 23 (Example 4). The reference differs from the instant claims insofar as it does not disclose using organohydrogenpolysiloxane in the antiperspirant compositions.

It is *prima facie* obviousness to select a known material based on its suitability for its intended use. *See Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U.S. 327, 65 USPQ 297 (1945). Also, established precedent holds that it is generally obvious to add known ingredients to known compositions with the expectation of obtaining their known function. See, e.g., In re Linder, 457 F.2d 506, 507 (CCPA 1972); see also In re Dial, 326 F.2d 430, 432 (CCPA 1964). It would have been obvious to one of ordinary skill in the art to have used the aluminum compounds in conjunction with the compositions of the primary reference motivated by the desire to us an antiperspirant active for its known function when using the organohydrogenpolysiloxane in an antiperspirant cosmetic composition. Alternatively, it would have been obvious to one of ordinary skill in the art to have used the organohydrogenpolysiloxane in the compositions of the secondary reference motivated by the desire to eliminate the problems of stability associated with the oils used separating out of the compositions by using a component that absorbs oils such as silicone oils that are used in the deodorant compositions as supported by the primary reference.

2) Claims 24-47, 50 and 52-57 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sakuta (EP 0 501 791) in view of Powell et al. (US 6,060,546).

The primary reference is discussed above. The reference discloses organohydrogenpolysiloxane materials for cosmetic compositions. The examples describe a procedure wherein when the cosmetics are made using these materials, water is added last. Therefore before the water is added the compositions are anhydrous materials. The reference differs from the instant claims insofar as it does not disclose using vitamin C in the cosmetic compositions.

Powell et al. disclose non-aqueous silicone emulsions. The reference is used primarily as a resource to disclose components used in different non-aqueous cosmetic compositions depending on the cosmetic compositions desired. These cosmetics include antiperspirants and deodorants (col. 16, line 47). The compositions comprise a silicone phase, comprising a silicone elastomer, a low molecular weight silicone compound and an organic phase, comprising an organic liquid. The compositions included mixtures of decamethylcyclopentasiloxane and isopropanol (see Examples). The organic liquids include ethanol, propylene glycol, dipropylene glycol tripropylene glycol and glycerin. The personal care products may comprise ascorbic acid or an enzyme. Antiperspirant compositions comprise actives such as aluminum hydroxyhalides, aluminum chlorohydrate, and complexes or mixtures thereof with zirconyl oxyhalides and zirconyl hydroxyhalides, such as aluminum-zirconium chlorhydrate (col. 17, lines 9-16). The compositions may also comprise vitamins. The reference differs from the instant claims insofar as it does not disclose using organohydrogenpolysiloxane in the compositions.

It would have been obvious to one of ordinary skill in the art to have used the aluminum compounds and the ascorbic acid in conjunction with the compositions of the primary reference motivated by the desire to use personal care actives for their known function, as supported by cited precedent. *See Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U.S. 327, 65 USPQ 297 (1945). See, e.g., In re Linder, 457 F.2d 506, 507 (CCPA 1972); see also In re Dial, 326 F.2d 430, 432 (CCPA 1964) as stated *supra*.

3) Claims 8-50 and 52-57 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sakuta (EP 0 501 791) in view of Kilgour et al. (US 6,262,170).

The primary reference is discussed above. The reference discloses organohydrogenpolysiloxane materials for cosmetic compositions. The examples describe a procedure wherein when the cosmetics are made using these materials, water is added last. Therefore before the water is added the compositions are anhydrous materials. The reference differs from the instant claims insofar as it does not disclose using vitamin C or E in the cosmetic compositions.

Kilgour et al. discloses personal care compositions comprising silicone elastomers. The reference is used primarily as a resource to disclose components used in different cosmetic compositions depending on the cosmetic compositions desired. The compositions include antiperspirants (col. 8, line 1). An antiperspirant composition comprises one or more active agents, such as, aluminum halides, aluminum hydroxyhalides, for example, aluminum chlorohydrate, and complexes or mixtures thereof with zirconyl oxyhalides and zirconyl hydroxyhalides, such as for example,

aluminum-zirconium chlorohydrate, and the silicone elastomer of the present invention. The skin care actives may include vitamins, such as, for example, vitamin C and vitamin E (col. 8, lines 19-38). The silicone fluid used in the compositions includes decamethylcyclopentasiloxane (col. 6, lines 53-67). Organic liquids included in the compositions include stearyl alcohol, ethanol, propyl alcohol, isopropyl alcohol, ethylene glycol, propylene glycol, dipropylene glycol, tripropylene glycol, butylene glycol, iso-butylene glycol and glycerin (column 7). The reference differs from the instant claims insofar as it does not disclose using organohydrogenpolysiloxane in the compositions.

It would have been obvious to one of ordinary skill in the art to have used the aluminum compounds and vitamins C and E in conjunction with the compositions of the primary reference motivated by the desire to use personal care actives for their known function, as supported by cited precedent. *See Sinclair & Carroll Co. v. Interchemical Corp.*, 325 U.S. 327, 65 USPQ 297 (1945). See, e.g., In re Linder, 457 F.2d 506, 507 (CCPA 1972); see also In re Dial, 326 F.2d 430, 432 (CCPA 1964) as stated *supra*.

(10) Response to Argument

1) Claims 8-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sakuta (EP 0 501 791) in view of Shin (US 4,937,069).

A) Appellant asserts one of the objects of Sakuta is to obtain "a pasty silicone oil composition wherein water can be uniformly, stably dispersed in the composition without use of any surface active agent." (Brief, page 4, 4th paragraph, last two lines). t

is evident that the disclosure of Sakuta is directed to aqueous cosmetic compositions wherein water is dispersed in the pasty silicone composition and not non-aqueous compositions. In addition, Sakuta's silicone polymer is designed specifically to be for use in applications where it is necessary to disperse water and thus does not disclose or suggest a non-aqueous cosmetic composition.

The Examiner disagrees and asserts that the instant claims recite a non-aqueous material, which reads on raw materials, intermediate material where in a mixture is made before adding other components to complete the product; and the product itself. There is nothing in Appellant's claims that leads one to believe that the claims encompass only a finished product.

B) Appellant further asserts the Examiner is using impermissible hindsight because it is evident that the concept of developing a non-aqueous cosmetic composition comes from appellant's disclosure, not from the disclosure of Sakuta. In an obviousness determination, one can not employ impermissible hindsight by using the claimed invention as a roadmap to locate the components thereof in the prior art. It is evident that the rejection is based on an alleged modification of an intermediate "nonaqueous material," not the final cosmetic composition which is aqueous. The reference does not suggest the production of a nonaqueous material, per se, or a dermatic composition for perspiration control. Regarding modification of intermediate materials, see Appellant' remarks on page 6, 2nd paragraph.

The Examiner disagrees and submits, although Sakuta does not teach a non-aqueous product, it does teach non-aqueous materials, as recited in the instant claims. The silicone polymers and silicone oils are non aqueous themselves. Furthermore the silicone materials can disperse powders or pigments without settlement and therefore it would have been obvious to use the materials of the Sakuta because they can evenly distribute dry material when a solvent is not present. Furthermore, one of Sakuta's objectives is to provide a silicone polymer which is able to thicken low viscosity silicone oils thereby making a paste or greasy composition. Therefore one of skill in the art would look to Sakuta to find silicone polymers that could disperse silicone oils in all types of cosmetic compositions and not just ones comprising water. In regards to it not being obvious to isolate an intermediate, the case law cited by Appellant on page 6, paragraph 2 of the Appeal Brief appears to deal with a reaction mixture that forms as an intermediate during a synthesis where one compound reacts with another species to make a final product, which is not the case here. The intermediates Appellant is referring to are in the reaction mixture and it would take additional steps in order to isolate the intermediate or determine if an intermediate exists. In the instant case, ingredients are being added 1 by 1, making a new material as each component is mixed. There is no need to take additional steps to isolate these materials because they are already isolated. In the reference water is added last to a mixture. This mixture is non-aqueous because it comprises no water and no additional steps are needed to isolate the mixture.

C) Appellant asserts the rejection presents no rationale as to why one would disperse an antiperspirant compound in the intermediate non-aqueous composition rather than dispersing the antiperspirant compound in the water which is to be mixed with the non-aqueous composition to form the final product. One of ordinary skill in the art would have no expectation that the silicone composition of Sakuta would be suitable for stabilizing antiperspirant or vitamin C in skin care compositions. With respect to the addition of an aluminum compound having perspiration control activity to the intermediate non- aqueous composition of Sakuta, the rejection relies on the disclosure of Shin (US '069). The rejection fails to set forth any rationale as to why one of ordinary skill in the art would look to a disclosure which describes an anhydrous composition and the problems of hydrous compositions to modify a composition designed for use in an aqueous composition. Shin does not disclose or suggest a composition containing the silicone polymer disclosed by Sakuta. Appellant Sakuta does not mention use of the disclosed compositions for an antiperspirant, and Shin does not suggest the use of a silicone polymer similar to the silicone polymer disclosed by Sakuta in an antiperspirant composition.

The Examiner disagrees and asserts, one of skill in the art would have reasonable expectation that the silicone compositions of Sakuta would be suitable for stabilizing an antiperspirant and vitamin C because the disclosure indicates that the compositions disperses powders. It would have been obvious to mix components such as vitamin C with the non-aqueous components because vitamin C is sensitive to water. Furthermore, Sakuta discloses using the silicone compositions in cosmetic

compositions. Shin discloses silicone polymers are used in the antiperspirants and therefore it would be obvious to use the pastes of Sakuta to make antiperspirants with suitable ingredients disclosed by Shin. The rationale to use the compositions of Sakuta in an anhydrous composition is that it can disperse powders evenly and therefore it would be reasonably expected that additional components would not be need to make a composition with evenly distributed active agent.

D) Appellant further asserts that no support is provided for the assertion by the Examiner that it would be obvious to use organohydrogenpolysiloxane in the Shin composition "to eliminate the problems of stability associated with oils ... by using a component that adsorbs oils such as silicone oils." The rejection does not indicate where in the prior art such a problem is described or where the use of a silicone oil to adsorb oil will address such a problem. The waxy ingredient present in the Shin composition already provides the absorption feature stated in the rejection, as well as other desirable features. Thus, the rejection fails to present any rationale that would lead one of ordinary skill in the art to replace the organic wax material in the composition of Shin with a silicone polymer made from an organohydrogenpolysiloxane, let alone the silicone polymer disclosed by Sakuta.

The Examiner disagrees and supports this assertion by referring to the cited reference of Shin at col. 1, lines 20-25 and col. 2, lines 18-21, which discloses that the anhydrous compositions of the Shin are resistant to syneresis and oil staining. One of skill in the art would reasonable conclude that oil staining is a result from instability of

mixtures comprising oil. Although Shin uses wax for this problem the wax may be used in combination with the silicone compositions of Sakuta. Additionally it would be reasonable to expect wax would not be needed if the silicone compositions of Sakuta were used in the place of the silicone components of Shin.

E) Appellant asserts that the Examiner implies that the recitation of parts by weight in regards to amount of each component is meaningless because it is in parts by weight and does not state the total weight of the composition. Reciting amounts in parts in by weight clearly describe the amount of a component relative to the amount of another component. The rejection fails to establish how the amounts 100 parts by weight of the silicone composition paste and 50 to 500 parts by weight of an aluminum compound are rendered obvious by the prior art.

In response, it is the Examiner's position that it would take no more than relative skill of one in the art to determine the amounts of silicone material and vitamin C or aluminum compound suitable for the dermatic cosmetic materials of the instant claims. Furthermore, the recitation of 100 parts silicone composition paste and 50 to 500 parts by weight of an aluminum compound encompasses a 1:1 ratio. Normally, changes in result effective variables are not patentable where the difference involved is one of degree, not of kind; experimentation to find workable conditions generally involves the application of no more than routine skill in the art. See MPEP 2144.05 II. It would have been obvious to one of ordinary skill in the art to have added the appropriate amount of

silicone paste and an aluminum compound or vitamin C to the compositions motivated by the desire to optimize the effect of the ingredients in the composition.

2) Claims 24-47, 50 and 52-57 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sakuta (EP 0 501 791) in view of Powell et al. (US 6,060,546).

A) Appellant asserts it is evident that, as it relates to cosmetic compositions, the disclosure of Sakuta is directed to aqueous cosmetic compositions wherein water is dispersed in the pasty silicone composition. This is also apparent from the Examples. In addition, Sakuta's silicone polymer is designed specifically to be for use in applications where it is necessary to disperse water. For example, in the formulas describing the silicone polymer, subscripts "a" and "b" are selected so that their values do not result in compositions that inadequately disperse water. Sakuta thus does not disclose or suggest a non-aqueous cosmetic composition. Nor does Sakuta disclose or suggest a non-aqueous dermatic cosmetic for perspiration control. It is evident that the concept of developing a non-aqueous cosmetic composition comes from appellant's disclosure, not from the disclosure of Sakuta. Nothing within the rejection indicates why one of ordinary skill in the art seeking to provide a non-aqueous cosmetic composition would look to Sakuta's disclosure of a composition that is specifically designed to be able to uniformly disperse water.

The Examiner disagrees and asserts, as stated above, one of the objectives of Sakuta is to provide a silicone polymer which is able to thicken low viscosity silicone oils thereby making a paste or greasy composition. There is nothing in the objection statement that sets forth that the paste or greasy compositions have to be used for non-aqueous compositions. The compositions may be used for cosmetics such as foundations. Therefore it may be concluded, that although one of the objectives of making the silicone polymer is for water dispersion in a cosmetic composition, it is not the only objective. Furthermore, the paste or greasy compositions themselves are non-aqueous and therefore the reference teaches a non-aqueous material. In Application 2, water was added last and therefore in the absence of the water, the composition was non-aqueous and isolated. Appellant appears to compare a reaction mixture such as a synthesis of a final product with the compositions of the reference which is different. In the reference the intermediate is already isolated and therefore is not comparable to the case law example to which Appellant is referring on page 6, paragraph 2 of the Appeal Brief, In re Lalu, 747 F.2d 703,223 USPQ 1257 (Fed.Cir. 1984). See also In re Jyurik, 596 F.2d 1012, 201 USPQ 552 (CCPA1979). Furthermore in the case of the instant claims, the claims do not recite the material is for perspiration control only that it is a dermatic cosmetic material. The material recited in the instant claims may be used in any suitable cosmetic.

B) Appellant further asserts the rejection presents no rationale as to why one would disperse vitamin C in the intermediate non-aqueous composition rather than

dispersing the antiperspirant compound in the water which is to be mixed with the non-aqueous composition to form the final product. Sakuta provides no disclosure or suggestion that the silicon composition described therein can stably disperse active substances such as antiperspirants or vitamin C. One of ordinary skill in the art would have no expectation that the silicone composition of Sakuta would be suitable for stabilizing antiperspirant or vitamin C in skin care compositions base on Appellant's disclosure discussing problems dispersing vitamin C in silicone compositions. Appellant further asserts the Examiner uses Powell to disclose aluminum compounds and ascorbic acid. The suggestion of using aluminum compounds and ascorbic acid in one type of composition does not suggest their use in significantly different compositions. Nothing in the Powell at al. disclosure suggests using aluminum compounds and/or ascorbic acid in compositions like Sakuta that employ a silicone polymer made from an organohydrogenpolysiloxane and either a polyoxyalkylene or an organopolysiloxane as a major component. Powell et al. do not suggest materials comprising a combination of cross-linked silicones with vitamin C. Neither of the references teaches or suggests the concept of combining water-degradable vitamin C with hydrophilic cross-linked silicones, as in the rejected claims.

In response to why one of skill in the art would not disperse vitamin C in water, the Examiner asserts that Powell (col. 16, line 65 to col. 17, line 3) discloses that vitamin C is sensitive to water and therefore it is reasonable to conclude that one of skill in the art would add the vitamin C to the non-aqueous component, especially in view of the disclosure by Sakuta that the silicone compositions of the reference disperse

powders. In regards to Powell, Powell discloses components used in cosmetics that comprise silicone components. It is reasonable to conclude that one would look to the reference of Powell when making cosmetics from the silicone compositions of Sakuta to determine suitable component for incorporation into the desired compositions when using silicone components.

C) Appellant asserts Powell at al. provide no suggestion as to what amounts of such agents would be used in a composition containing an organohydrogenpolysiloxane. Compare appellants' claim 24 which recites that the composition contains 0.5 to 100 parts by weight of vitamin C per 100 parts by weight of a specific silicone composition paste. The Examiner implies that such a recitation is meaningless because it is in parts by weight and does not state the total weight of the composition. Reciting amounts in parts in by weight clearly describe the amount of a component relative to the amount of another component. The rejection fails to establish how the amounts 100 parts by weight of the silicone composition paste and 0.5 to 100 parts by weight of vitamin C are rendered obvious by the prior art.

In response, it is the Examiner's position that it would take no more than relative skill of one in the art to determine the amounts of silicone material and vitamin C or aluminum compound suitable for the dermatic cosmetic materials of the instant claims. Furthermore, the recitation of 100 parts silicone composition paste and 50 to 500 parts

by weight of an aluminum compound encompasses a 1:1 ratio. Normally, changes in result effective variables are not patentable where the difference involved is one of degree, not of kind; experimentation to find workable conditions generally involves the application of no more than routine skill in the art. See MPEP 2144.05 II. It would have been obvious to one of ordinary skill in the art to have added the appropriate amount of silicone paste and an aluminum compound or vitamin C to the compositions motivated by the desire to optimize the effect of the ingredients in the composition.

3) Claims 8-50 and 52-57 were rejected under 35 U.S.C. 103(a) as being unpatentable over Sakuta (EP 0 501 791) in view of Kilgour et al. (US 6,262,170).

A) Appellant asserts the disclosure of Sakuta is discussed above and the disclosure of Kilgour et al. is relied on for its disclosure of using aluminum compounds in antiperspirant compositions and skin care compositions that contain, for example, vitamin C. The Kilgour et al. disclosure, however, is devoid of any suggestion of a silicone polymer that contains any oxyalkylene units or other hydrophobic structures. Thus, Kilgour et al. provide no suggestion for modifying the compositions of Sakuta that contain a silicone polymer having oxyalkylene units. Appellant further asserts, in the rejection that the Examiner argues that Kilgour is cited simply for a teaching of additional components in cosmetic compositions. However, this neglects the important

question of whether one of ordinary skill in the art would extract those teachings for use with the primary reference. In fact, one of ordinary skill in the art would not do so. It is clear that silicone elastomer described in Kilgour is hydrophobic since it does not have any hydrophilic groups. Therefore, one of ordinary skill in the art would not modify the composition of Sakuta in view of the Kilgour reference, since the oxyalkylene unit-containing silicone of Sakuta is completely different physically.

The Examiner disagrees and asserts that Sakuta discloses using the silicone materials to make cosmetics. Cosmetics include not only face creams and foundations but also lotions and antiperspirants. Therefore when making these compositions, one of skill in the art would be motivated to look to the prior art to determine which ingredients are suitable for the desired compositions. Furthermore Kilgour also teaches that silicone polymers are used in cosmetic compositions comprising vitamin C and aluminum compounds. Therefore one of skill in the art would have reasonable expectation that the silicone materials of Sakuta are suitable for making cosmetic compositions such as antiperspirants or other cosmetics comprising vitamin C.

B) Appellant further asserts Kilgour provide no suggestion as to what amounts of such agents would be used in a composition containing an organohydrogenpolysiloxane. The Examiner implies that such a recitation is meaningless because it is in parts by weight and does not state the total weight of the composition. Reciting amounts in parts in by weight clearly describe the amount of a

component relative to the amount of another component. The rejection fails to establish how the amounts 100 parts by weight of the silicone composition paste and 0.5 to 100 parts by weight of vitamin C or 100 parts by weight of the silicone composition paste and 50 to 500 parts by weight of an aluminum compound are rendered obvious by the prior art.

In response, it is the Examiner's position that it would take no more than relative skill of one in the art to determine the amounts of silicone material and vitamin C or aluminum compound suitable for the dermatic cosmetic materials of the instant claims. Furthermore, the recitation of 100 parts silicone composition paste and 50 to 500 parts by weight of an aluminum compound encompasses a 1:1 ratio. Normally, changes in result effective variables are not patentable where the difference involved is one of degree, not of kind; experimentation to find workable conditions generally involves the application of no more than routine skill in the art. See MPEP 2144.05 II. It would have been obvious to one of ordinary skill in the art to have added the appropriate amount of silicone paste and an aluminum compound or vitamin C to the compositions motivated by the desire to optimize the effect of the ingredients in the composition.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Lezah W Roberts/
Examiner, Art Unit 1612

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